U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: LIN 03 087 50802 Office: NEBRASKA SERVICE CENTER Date: SEP 23 2005

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a postdoctoral fellow at Indiana University/Purdue University School of Medicine. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states:

> [The petitioner] is playing a key role in investigating the cellular mechanisms underlying pain because once it is better understood, better treatment modalities can be developed. One important aspect of his research involves determining which prostaglandin receptor subtypes mediate prostaglandin-induced sensitization of sensory neurons. His current work is an extension of his previous research at Indiana University, in that both research endeavors concern how neurons are excited, either in a diseased state or during memory formation. In fact . . . at Indiana University, [the petitioner] specifically investigated the processes of memory formation in an invertebrate species, Hermissenda, at the molecular and cellular level. His cutting-edge research revealed that inhibition of protein phosphatase leads to increased excitability in photoreceptors, which is due to over-phosphorylation of potassium channels. This finding not only shed light on the memory formation process, but also may [be] related to pathological changes in Alzheimer's disease (AD). Importantly, it has been observed that in the brains of AD patients there is over-phosphorylation of Tau protein that has been suggested to be due to a dysfunction in phosphatase activity.

To explain why a national interest waiver is in order, counsel states:

> The labor certification process is a sterile procedure, which . . . works well for a machinist or even tax accountant for instance, where the minimal job qualifications are in fact quantifiable. However, in the instant case, [the petitioner's] cutting edge research involves employing and developing highly sophisticated, cutting-edge techniques in a creative and innovative manner that cannot be readily described under labor certification application forms.

Congress made research scientists subject to the job offer requirement, and in its original form (prior to a technical amendment), the national interest waiver was not available to members of the professions holding advanced degrees. Therefore, we are not persuaded by the general argument that the technical sophistication of their work should exempt scientists as a class from the job offer/labor certification requirement. We also note that other classifications exist, that do not require labor certification, for scientists with national acclaim or who are internationally recognized as outstanding. *See* sections 203(b)(1)(A) and (B) of the Act.

Several letters accompany the petition. Indiana University Professor Joseph Farley states:

> [The petitioner] was a graduate student in my laboratory until December 2000 when he received his Ph.D. and moved to the medical school at Indiana University/Purdue University at Indianapolis. . . .
>
> [The petitioner's] research in my laboratory concerned the regulation of potassium ion channel activity in photoreceptors of a marine snail (*Hermissenda*) by protein phosphatases. Potassium ion channels are cell membrane proteins that directly contribute to the electrical excitability of many cell types. . . . Modulation of potassium channel activity . . . is a well-established principle that underlies communication between cells, and the biochemical processes of phosphorylation/dephosphorylation have been implicated as key contributors to this modulation. . . . Thus, potassium (K^+) channels and their modulation by protein kinases and phosphatases are of immediate medical importance.
>
> Through their effects on neuronal excitability, K^+ channels have also been implicated as mediators of learning and both short- and long-term forms of memory storage in the brain. And it is in this area where [the petitioner] has made important contributions. In my laboratory, [the petitioner's] main area of research centered on the involvement of serine/threonine protein phosphatases (PPs) in regulating K^+ channels in *Hermissenda* Type B photoreceptors, and the possible involvement of phosphatases in the production of learning-related excitability changes in these cells. The *Hermissenda* system he has worked on has . . . made major contributions to contemporary understanding of the cellular and molecular bases of learning and memory. . . .
>
> [The petitioner's] dissertation research represents a very important contribution to the field, and one that is already receiving much attention. . . .
>
> During his six years in my laboratory, he made pivotal contributions to phosphatase-modulation of K^+ channel research. These accomplishments are already being widely recognized in the field and will continue to be recognized as further articles . . . are published.

Indiana University Professor [redacted] states:

> Since entering my laboratory, [the petitioner] has been focusing his efforts on the critically important area of pain research. . . . His combined knowledge of multiple approaches to address important and clinically relevant scientific questions makes me confident that he will continue to grow as a scientist and make important contributions that will help advance our understanding of the etiology of pain. . . .
>
> [The petitioner] already is making significant contributions to science in understanding the modulation of sensory input. He has published on the fundamental question of the cellular mechanism mediating excitability of photoreceptors. In my laboratory, he has developed a unique model to study the role of the IP receptor for prostacyclin in chronic pain. By understanding this, it could be possible to ascertain the mechanisms that modulate sensory input and the potential mechanisms for sensory transduction.

Several other witnesses offer highly complimentary assessments of the petitioner's skills and accomplishments. All but one of these witnesses are on the faculty of Indiana University. The remaining

witness, Dr. [redacted] of Pharmacia Corporation, studied alongside the petitioner at Indiana University. Thus, the witness letters are not *prima facie* evidence that the petitioner's work has had significant impact or attracted demonstrable notice outside of the faculty and students at Indiana University. Some witnesses claim that the petitioner's work has attracted wider recognition, for instance Prof [redacted] states that the beneficiary's work "is already receiving much attention," and Dr [redacted] states that the petitioner's published articles "have been cited by many other researchers in their publications." Nevertheless, these general assertions represent claims rather than evidence, and reliable evidence that the petitioner's work is recognized outside of Indiana University must originate from outside of Indiana University.

The director issued a request for evidence (RFE), stating that the petitioner had not adequately established eligibility for the national interest waiver. In response, counsel argues that the director has attempted to impose too high a standard. It is true that, to qualify for a national interest waiver, the petitioner need not meet the level required for classification as an alien of extraordinary ability under section 203(b)(1)(A) of the Act, or as an outstanding researcher under section 203(b)(1)(B) of the Act, and many of the specific points contained in the RFE adhere to too high a standard. At the same time, the petitioner must do more than simply show that he qualifies for classification under 203(b)(2) and that his prospective employer cannot, or does not wish to obtain a labor certification on his behalf. The RFE contains more reasonable requests, for instance the director's assertion that the petitioner should substantiate the vague claims of wide recognition of the petitioner's work.

Counsel states:

> [P]roof of citation of [the petitioner's] work is included. However, a full citation search was not undertaken because the RFE clearly stated that "the mere reference to the beneficiary and his work within an article or in a footnote or bibliography is insufficient." However, the enclosed AAO decision . . . specifically indicates that "evidence of citation of his work, which would have been very helpful in establishing eligibility." Thus, an incorrect standard for review of evidence appears to be involved in [the petitioner's] case.

By arguing that the director applied "an incorrect standard for review of evidence," counsel indicates that the director should rely more heavily on citation of the petitioner's work. Nevertheless, having argued as such, counsel states "a full citation search was not undertaken." Counsel does not specify the extent of the "proof of citation" submitted; we have been able to locate in the record one document showing three citations of one of the petitioner's articles, over the course of about two years. This citation record is minimal. Counsel seems to imply that a more thorough search would yield more citations of the petitioner's work, but that the petitioner has elected not to submit evidence of those citations. It is the petitioner's responsibility to submit evidence in support of his claim. The three citations documented in the record are not sufficient to show that the petitioner's work has attracted "much attention" or that "many other researchers" have cited the petitioner's work.

The director denied the petition, acknowledging the petitioner's academic credentials and published work, but finding that these qualifications do not significantly distinguish the petitioner from other qualified professionals in his field. The director also acknowledged the witness letters submitted in support of the petition, but found that these letters do not establish eligibility.

The director, in denying the petition, concluded that the petitioner has not shown that his work is national in scope. Medical and scientific research at major institutions is inherently national in scope, however, because the results are disseminated nationally (and internationally) through publications and conferences and because

the findings of such research tend to apply universally rather than only locally. We therefore withdraw the director's finding that the petitioner's work lacks national scope.

On appeal, counsel cites some ambiguously worded passages from the director's decision, and correctly argues that an applicant for a national interest waiver need not "be the most exceptional in his or her field of endeavor or better than everyone else in the field." The director's denial notice, however, did not indicate that the petitioner had to be the single best person in his field. Therefore, counsel here rebuts a finding that does not appear in the denial notice. The director had, in fact, stated "it would appear that an alien's qualifications must, in fact, lie somewhere between 'exceptional' and 'extraordinary' to qualify for a national interest [waiver]." This is not an unreasonable stance, given that an alien of exceptional ability must (typically) meet the job offer requirement, and therefore one cannot reasonably hold that exceptional ability, *per se*, is *prima facie* grounds for a waiver.

Counsel states that the director essentially conceded the petitioner's eligibility by stating: "The Service will concede that the petitioner offers a significant benefit to his field of endeavor." Counsel, however, has taken this passage our of context. The paragraph in which it appears reads, in full:

> The Service will concede that the petitioner offers a significant benefit to his field of endeavor. But again, the evidence of record does not demonstrate that the petitioner's qualifications significantly exceed the "prospective national benefit" that is required of all aliens who seek to qualify as "aliens of exceptional ability" under the auspices of the labor certification program.

The plain wording of section 203(b)(2)(A) of the Act makes it clear that aliens "who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States" must also demonstrate that their "services . . . are sought by an employer in the United States." Substantial prospective national benefit is obviously not a sufficient basis for a national interest waiver, or the wording of the statute (requiring substantial prospective benefit *and* a job offer) would simply make no sense. Nothing at all in the statute or regulations indicates that, with regard to the national interest waiver, one standard applies to aliens of exceptional ability, and a different, lower standard applies to members of the professions holding advanced degrees.[1] The inescapable conclusion is that a showing of prospective national benefit is necessary, but not *sufficient*, for a national interest waiver, whether the alien seeking that waiver is an alien of exceptional ability or a member of the professions holding an advanced degree (or both). Counsel fails to demonstrate that the petitioner rises to the standard correctly set forth by the director.

Counsel correctly states that the director has made unfounded assumptions about the labor certification process, but at the same time, counsel has made the equally unfounded claim that labor certification is inherently unsuitable for highly technical research positions. General arguments about the real or perceived shortcomings of the labor certification process do not translate into arguments in favor of granting a waiver in specific instances. Every alien seeking benefits under section 203(b)(2) of the Act is presumed to be subject to the job offer/labor certification requirement until the evidence warrants an exemption from that requirement. Counsel's argument, that some positions are inherently too complex and specialized for labor certification, presumes the opposite of the statute and seeks to place the burden on CIS to show that labor certification would be appropriate.

---

[1] We do not consider, here, the provisions of section 203(b)(2)(B)(ii) of the Act, which apply only to certain physicians. These provisions are not relevant to the matter at hand because the petitioner is not a physician.

Much of counsel's appellate brief is devoted to a critique of the director's admittedly flawed RFE, rather than to the director's more defensible basic findings. Counsel has submitted copies of two unpublished appellate decisions as examples of the AAO's reasoning in national interest waiver decisions. Both of these cited decisions discuss the importance of citations; one of the decisions states that "documentation of heavy citation of the petitioner's published work" greatly strengthens a petition. Counsel has asked that these unpublished, non-precedent decisions be taken into consideration, but counsel does not explain why such consideration would be favorable to the petitioner. The petitioner has documented only three citations. One of the cited decisions also discusses the importance of independent evaluations of an alien's work, to show that the impact of that work extends beyond the alien's own immediate circle of professors and collaborators. In this instance, the witness base consists entirely of faculty and alumni of Indiana University. Counsel, on appeal, has not addressed these deficiencies (despite being in possession of AAO decisions that stress these factors), instead basing the appeal largely on complaints about the request for evidence.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.